[GarciaMinuteEntry]

MINUTE ENTRY

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A). This case has been under advisement and the Court has considered and reviewed the record of the proceedings from the Phoenix City Court and the memoranda submitted by counsel.

Appellant alleges the trial court erred in granting Appellee's Motion to Suppress evidence obtained under an alleged violation of the Fourth Amendment. Appellant claims that no unreasonable seizure of Appellee occurred because the conversation was consensual. Appellant further alleges that probable cause for the stop existed based upon the police officers' observation of Appellee and her companion, Mr. Vega, and upon their prior experience. Appellee, on the other hand, states that a seizure occurred because she felt she had no choice but to speak with the police officers and because the officers stopped her on a hunch, without probable cause.

The standard of review of a trial court's holding on a motion to suppress evidence where there is an alleged violation of the Fourth Amendment is one of abuse of discretion concerning the trial court's factual findings.[1] Mixed questions of law and fact and the trial court's ultimate legal conclusion, however, are reviewed *de novo*.[2]

As a general rule, police officers may approach individuals and ask them questions if the conversation is consensual.[3] A reasonable person in the individual's position must feel as if he is able to refuse to answer the questions.[4] The exchanges are typically not consensual if it was physically compelled, if the officer flashed his gun in conjunction with the request, if the officer's words or tone of voice indicated the individual could not refuse the request, or if the individual refused and the officer repeated the request to talk or otherwise insisted on the conversation.[5]

The evidence in this case shows overwhelmingly that the conversation was consensual. Both police officers and Appellee all testified at the hearing

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1 *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996).

2 *Id.*

3 *Florida v. Bostick*, 501 U.S. 429, 434, 111 S.Ct. 2383, 2386, 115 L.Ed.2d 389, 398 (1991); *State v. Wyman*, 197 Ariz. 10, 13, 3 P.2d 392, 395 (Ariz. Ct. App. 2000).

4 *Bostick*, 501 U.S. 429 at 434.

5 *Wyman*, 197 Ariz. 10 at 13.

that they asked if they could speak with her using words to the effect "can I speak with you."[6] No evidence was offered indicating that the officers used physical or verbal intimidation to compel the conversation. The cases cited by Appellee are inapposite. The United States Supreme Court has only required police officers specifically to ask an individual's consent to search him or his luggage, not just to speak to him.[7] In *State v. Rogers*, the police officers demanded to talk to the defendants and then gave chase when the defendants refused and ran away.[8] Here, the police officers only talked to Appellee and Mr. Vega, they did not search them or their belongings. Additionally, the officers asked Appellee and Mr. Vega if they could talk rather than demanding such a conversation.

Appellee and Mr. Vega testified that they felt they had no choice but to speak with the police officers -- Appellee because she was afraid of them and Mr. Vega out of respect for police. The reasonable person standard, however, is an objective one. While the average citizen may reasonably feel some fear of or respect for the police, that is not sufficient to find there was an illegal seizure. Instead, a reasonable person in Appellee's circumstances and based upon the actions of the police officers toward her must have felt they were giving her no choice but to talk to them. There is no evidence that was the case here.

Law enforcement officials may only question individuals, however, if they have probable cause to do so. In cases involving alleged violations of the Fourth Amendment, probable cause is "reasonably trustworthy information and circumstances [that] would lead a person of reasonable caution to believe an offense has been committed by the subject." [9] This belief does not need to rise to the level of proof required to convict, but must be more than mere suspicions.[10]

While one officer stated that he acted on a hunch in questioning Appellee and Mr. Vega, he also testified that he relied on other factors.[11] These included the way Appellee was dressed, his knowledge that the hotel was frequently used for acts of prostitution, and his years of experience as a police officer. While any one of these would not arise above the level of suspicions, taken together they are sufficient to establish probable cause. The fact that the officers had previously questioned some individuals at this

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6 *See* audiotape of trial court motion hearing.

7 *Florida v. Bostick*, 501 U.S. 429, 435, 111 S.Ct. 2382, 2385, 115 L.Ed.2d 329 (1991).

8 *State v. Rogers*, 186 Ariz. 508, 511, 924 P.2d 1027, 1030 (1996).

9 *State v. Moorman*, 154 Ariz. 578, 582, 744 P.2d 674, 678 (1987).

10 *Id.*

11 *See* audiotape of trial court motion hearing.

location who had not committed a crime is irrelevant to their determination in this case that Appellee had probably just committed a crime.

The final issue raised by the Appellee concerns the sufficiency of the evidence to warrant a conviction and finding of responsibility. When reviewing the sufficiency of the evidence, an appellate court must not re-weigh the evidence to determine if it would reach the same conclusion as the original trier of fact.[12] All evidence will be viewed in a light most favorable to sustaining a dismissal and all reasonable inference will be resolved for the Defendant.[13] An appellate court shall afford great weight to the trial court's assessment of witnesses' credibility and should not reverse the trial court's weighing of evidence absent clear error.[14] When the sufficiency of evidence to support a judgment is questioned on appeal, an appellate court will examine the record only to determine whether substantial evidence exists to support the action of the lower court.[15] The Arizona Supreme Court has explained in *State v. Tison*[16] that "substantial evidence" means:

> More than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial.[17]

This Court finds that the trial court's determination was not clearly erroneous, but that the trial court erred in granting the Motion to Suppress.

IT IS THEREFORE ORDERED reversing the granting of the Motion to Suppress of the Phoenix City Court in this case.

IT IS FURTHER ORDERED remanding this matter back to the Phoenix City Court for trial and for all further and future proceedings.

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[12] *State v. Guerra*, 161 Ariz. 289, 778 P.2d 1185 (1989); *State v. Mincey*, 141 Ariz. 425, 687 P.2d 1180, cert denied, 469 U.S. 1040, 105 S.Ct. 521, 83 L.Ed.2d 409 (1984); *State v. Brown*, 125 Ariz. 160, 608 P.2d 299 (1980); *Hollis v. Industrial Commission*, 94 Ariz. 113, 382 P.2d 226 (1963).

[13] *State v. Guerra*, supra note 12; *State v. Tison*, 129 Ariz. 546, 633 P.2d 355 (1981), cert. Denied, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982).

[14] *State v. Guerra*, supra note 12; *State v. Girdler*, 138 Ariz. 482, 675 P.2d 1301 (1983), cert denied, 467 U.S. 1244, 104 S.Ct. 3519, 82 L.Ed.2d 826 (1984).

[15] *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 961 P.2d 449 (1998); *State v. Guerra*, supra note 12; *State ex rel. Herman v. Schaffer*, 110 Ariz. 91, 515 P.2d 593 (1973).

[16] Supra note 13.

[17] *Id.* at 553, 633 P.2d at 362.